

IP 05-0371-M 2 F USA v Magana-Reynaga
Magistrate Kennard P. Foster

Signed on 10/13/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 05-0371M-02
JOSE MAGANA-REYNAGA,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on September 22, 2005, with conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II, Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(viii), and 846. On September 28, 2005, at the initial appearance, the government filed a written motion and moved for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with an offense for which the maximum sentence is life imprisonment, a drug trafficking offense where the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the defendant is a serious risk of flight, if released. The detention hearing was held on October 3, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney.

Mr. Magana-Reynaga appeared in person and by his appointed counsel, William E. Marsh, Indiana Federal Community Defender.

At the preliminary hearing, the Government rested on the complaint and tendered Bureau of Immigration and Customs Enforcement Special Agent Joshua Lievers for cross examination. Counsel for the defendant cross examined Special Agent Lievers on all issues before the Court. The defendant presented no additional evidence and submitted on the issue of probable cause. Consequently, the Court found that the evidence constituted probable cause to believe that the defendant committed the crime of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, as charged in the complaint.

The probable cause finding gave rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. The defendant did not rebut either the presumption that he is a danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant, Jose Magana-Reynaga is charged in a criminal complaint issued on September 22, 2005, with conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II, Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(viii), and 846.

2. The penalty for conspiracy to possess with intent to distribute and/or distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II, Non-Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 846, is a mandatory minimum sentence of ten (10) years and a maximum of life imprisonment.. Title 21 U.S.C. § 841(b)(1)(A)(viii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. At the preliminary hearing, the government submitted the matter on the complaint. Counsel for the defendant called Special Agent Joshua Lievers, Bureau of Immigration and Customs Enforcement, as a witness and examined him on all issues before the Court. Counsel for the defendant presented no additional evidence.

5. The Court finds there is probable cause for the offense the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. The Court admitted a Pre-Trial Services Report (PS3) regarding Mr. Magana-Reynaga on the issue of his release or detention. Mr. Magana-Reynaga is age 39 (DOB 1-30-66). The PS3 indicates the following:

(A) The defendant is a citizen of Mexico. He is an illegal alien and was previously deported from the United States.

(B) The defendant waived the interview with U.S. Probation and Parole.

7. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Jose Magana-Reynaga is ORDERED DETAINED.

8. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, Title 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. Title 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B), (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. Title 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety

of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

9. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, Title 21 U.S.C. §801 *et seq.*; the Controlled Substances Import and Export Act, Title 21 U.S.C. §951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. §1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) Title 18 U.S.C. §924(c); (3) Title 18 U.S.C. §956(a); or (4) Title 18 U.S.C. §2332b. Title 18 U.S.C. §3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a §3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

10. If Mr. Magana-Reynaga had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. On September 15, 2005, law enforcement seized over 3 pounds of methamphetamine from Jose Perez. Perez agreed to cooperate with law enforcement and identified "Sigi" (Jose Sigifrido Magana-Reynaga) as his source of supply for methamphetamine. Later, Perez placed a telephone call that was monitored by law enforcement to Magana-Reynaga. During the telephone call, Perez and Magana-Reynaga discussed Perez obtaining a quantity of methamphetamine from Magana-Reynaga. They also negotiated a price for the methamphetamine and agreed to meet the next day.

b. On September 16, 2005, Perez made several consensually monitored telephone calls to Magana-Reynaga. During these telephone calls, Magana-

Reynaga and Perez discussed money that Perez owed him for prior purchases of methamphetamine. Also discussed were future purchases of methamphetamine that Perez would make from Magana-Reynaga.

c. At approximately 1:15 p.m., Magana-Reynaga agreed to meet with Perez at the Wal-Mart parking lot located at 10617 on East Washington, Indianapolis, IN.

d. At approximately 2:12 p.m., Magana-Reynaga met Perez and a law enforcement agent working in an undercover capacity (UC) at the aforementioned Wal-Mart parking lot. This meeting, which occurred inside the UC's vehicle in the parking lot was monitored by law enforcement agents through the utilization of an electronic monitoring device installed within the vehicle. During this meeting, the UC negotiated with Magana-Reynaga regarding the purchase of several pounds of methamphetamine. There were also discussions about the debt Perez owed Magana-Reynaga for past purchases of methamphetamine.

e. Magana-Reynaga also told Perez that he wanted the title of the UC's vehicle as payment for the debt owed by Perez. Perez told the UC that Magana-Reynaga threatened to kill the UC if he (the UC) did not pay for the methamphetamine that Magana-Reynaga believed Perez gave to the UC on a "fronted" or consignment basis. Near the conclusion of the meeting, Perez provided Magana-Reynaga with approximately \$2,000.00 in U.S. currency (supplied by law enforcement) as a partial payment for methamphetamine that Magana-Reynaga previously provided to Perez.

f. At approximately 3:00 p.m., September 16, 2005, The Indiana State Police conducted a traffic stop on a vehicle driven by Magana-Reynaga. During the traffic stop, Magana-Reynaga was arrested. Law enforcement recovered the \$2,000 (undercover currency). Magana-Reynaga was read his Miranda warnings in Spanish by Special Agent Dan Schmidt, Drug Enforcement Administration. Magana-Reynaga waived his rights and agreed to speak to law enforcement. During the interview, that was conducted in Spanish, Magana-Reynaga stated that he was an illegal immigrant and been previously deported by U.S. Immigration.

g. The evidence demonstrates a strong probability of conviction.

h. The fact that the defendant is illegally in the United States after having been previously deported substantially increases the seriousness of his risk for flight.

The Court having weighed the evidence regarding the factors found in Title 18 U.S.C. §3142(g), and based upon the totality of evidence set forth above, concludes that even though the defendant has rebutted one of the presumptions in favor of detention, he nevertheless, should be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Jose Magana-Reynaga is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the

government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this day of October, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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